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**CATHY A. CATTERSON, CLERK**  
**U.S. COURT OF APPEALS**

**NOT FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MIGUEL ANGEL RIVERA-OCHOA,

Defendant - Appellant.

No. 04-10533

D.C. No. CR-04-1137-JMR

MEMORANDUM<sup>\*</sup>

Appeal from the United States District Court  
for the District of Arizona  
John M. Roll, District Judge, Presiding

Submitted November 8, 2005<sup>\*\*</sup>

Before: WALLACE, LEAVY, and BERZON, Circuit Judges

Miguel Rivera-Ochoa appeals his sentence imposed following his guilty plea to possession of methamphetamine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1). He contends that under *Apprendi v. New Jersey*, 530 U.S. 466

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<sup>\*</sup> This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

<sup>\*\*</sup> This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

(2000), and *Blakely v. Washington*, 124 S. Ct. 2531 (2004), his Sixth Amendment rights were violated by the district court's non-jury fact findings regarding: (1) the amount and type of drugs used in setting his base offense level under U.S.S.G. § 2D1.1(c)(3), and (2) his role in the offense under U.S.S.G. § 3B1.2. He was sentenced before the United States Supreme Court held in *United States v. Booker*, 125 S. Ct. 738 (2005), that the Sentencing Guidelines were effectively advisory, and he requests a remand for resentencing under the advisory Guidelines scheme. As the government notes, Rivera-Ochoa in fact received a minor role adjustment. Nonetheless, the record does not show how the district court would have proceeded had it known that the Guidelines were advisory rather than mandatory. We therefore remand for the district court to answer the question whether the sentence would have been materially different if it had known that the Guidelines were advisory, and for further proceedings under *United States v. Ameline*, 409 F.3d 1073, 1084-85 (9th Cir. 2005) (en banc).

**REMANDED.**